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NO. 80-1436

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

MALCOLM BALDRIGE, Secretary of Commerce, and DANIEL B. LEVINE, Acting Director, Bureau of the Census,

Petitioners,

v.

PETER SHAPIRO, Essex County Executive,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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Question Presented

Whether a bare list of street numbers in the possession of the Census Bureau is exempt from disclosure under the Freedom of Information Act, 5 USC 552?

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Petitioners,

v.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

Statement of the Case

Pursuant to 5 U.S.C. 552(a) (4) (B), of the Freedom of Information Act, 5 U.S.C. 552, (hereinafter referred to as the FOIA), Respondent Peter Shapiro, Essex County executive, commenced suit in the United States District Court for the District of New Jersey to compel the petitioners to

disclose the list of Essex County addresses which the Bureau of the Census utilized in conducting the 1980 census. This information was requested to enable the respondent (hereinafter referred to as county) to participate in a meaningful way in the 1980 Local Review Program sponsored by the petitioners (hereinafter referred to as the Census Bureau or Bureau). (J.A. 9).

The Local Review Program was developed to maximize the accuracy of the 1980 census and to afford local government officials an opportunity to review and comment on the Bureau's population and housing tabulations before those figures became final. (J.A. 59-63 Pet. B. 3-4)[1].

The county has sought to compare the Bureau's list of street numbers with a list prepared by the county in order to identify those addresses of which the Bureau was unaware. The County has repeatedly offered to provide its list to the Bureau so the Bureau could check the completeness of its information. The Bureau has repeatedly refused. (J.A. 18, 55). The Census Bureau argued that pursuant to Exemption 3 of the FOIA, 5 U.S.C. 552 (b) (3), a list of street numbers was specifically exempted from FOIA requests. In connection with this argument, the Cen-

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[1] In footnote 4, page 5, of the petitioner's brief, it is stated that the county submitted to the Bureau a letter identifying five enumeration districts for which the preliminary census figures were believed by the county to be inaccurate. That brief alleges that a recanvassing of those areas by the Bureau resulted in an addition of 45 persons to the count. What that footnote does not tell the court is that the county organized the efforts of local governments within the county which submitted additional data to the Census Bureau. In any event, if it is alleged by petitioners that the county's efforts have not resulted in significant additions to the count, this is further evidence that meaningful participation is not possible without access to the information requested herein.

sus Bureau maintained that the Census Act, 13 U.S.C. 1, et seq., specifically 13 U.S.C. 8 (b) and 9 (a), prohibited disclosure of all raw census data provided by particular individuals, and that this prohibition would include a bare list of addresses. (J.A. 11).

The district court held that Title 13, "does not provide a blanket of confidentiality for any and all census materials." Rather, the court held, the confidentiality requirement is structured to "insure against disclosure of any particular individual's response" (Pet. App. 9a-10a). The district court ordered the Census Bureau to turn over the address list after swearing in county personnel to observe the confidentiality requirements of the Census Act in accord with 13 U.S.C. 23(c). (Pet. App. 16a, 17a).

On appeal the court of appeals affirmed the district court's determination, "for the reasons stated by the district court." (Pet. App. 2a).

Despite the Ceusus Bureau's insistance that the county seeks information that can be identified with particular individuals, the County seeks only access to a bare list of street numbers for Essex County. (J.A. 54-55).

An accurate 1980 Census is essential. A major function of census statistics is to provide information necessary to determine state and local eligibility for federal programs. See S. Rep. No.: 94-1256, 94th Cong., 2d Sess. 1 (1976). These programs serve essential public purposes, and an undercount of the county's population will mean a concomitant reduction in county services. (J.A. 14-17).

The county's request for a bare list of street numbers which does not disclose any information about a particular individual, is directly related to ensuring the accurate enumeration of persons in Essex County. The production of such information under the FOIA does not violate any

provision of the Census Act. Accordingly, the decisions of the district court and the court of appeals should be affirmed.

Summary of the Argument

Under the Freedom of Information Act, 5 U.S.C. 552, the county seeks access to a list of street numbers which the Census Bureau used to conduct the 1980 census in Essex County. The Petitioners argue that sections 8(b) and 9(a) of the Census Act, 13 U.S.C. 1 et seq., prohibit the disclosure of all census data provided by individual respondents, and therefore the information requested by the county is exempt under the FOIA under 5 U.S.C. 552(b)(3), (Exemption 3).

Exemption 3 of the FOIA permits a federal agency to keep information from public view where a statute requires non-disclosure. The Census Act contains such a requirement in sections 8 and 9, but only to the extent that data can be identified with particular individuals.

The Census Bureau will not violate any provision of sections 8 and 9 of the Census Act by providing the county with a list of Essex County street numbers. A bare list of street numbers will not disclose who provided a particular address, how many units are in any dwelling, the identity or number of people living there, whether anyone lives there or whether there is a dwelling there. The petitioners did not even attempt to prove otherwise below, and the trial court's finding that disclosure will not infringe on individual privacy is unassailable.

Accordingly, the decision of the courts below directing petitioners to comply with the county's request for a list of street numbers should be affirmed.

ARGUMENT

Under the FOIA, unless information falls within one of the enumerated exceptions, it must be disclosed to the public.

A. The FOIA philosophy: disclosure is the rule.

The Freedom of Information Act was enacted to provide specific guidelines as to which agency records are to be disclosed to the public. Its predecessor, Section 3 of the Administrative Procedure Act, 5 U.S.C. 1002 (1964 ed.) was frequently utilized by government agencies as a basis for denying access to public records and as such, had been viewed as a withholding statute rather than a disclosure statute. *EPA* v. *Mink*, 410 U.S. 73, 79 (1973); See S. Rep. No. 813, 89th Cong., 1st Sess. 5 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966). The Administrative Procedure Act contained several vague phrases upon which officials could rely to refuse requests for disclosure, such as, "in the public interest", "relating solely to the internal management of an agency," "for good cause shown." Additionally, the information was only available to persons properly and directly concerned. See *G.T.E. Sylvania Inc.* v. *Consumers Union of the United States, Inc.*, 445 U.S. 375, 384-85 (1980).

In sharp contrast to Section 3 of the Administrative Procedure Act, the clear mandate of the FOIA is full public access to government information subject to a limited number of clearly delineated and carefully structured exemptions. *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 220 (1978); *FOMC* v. *Merrill*, 443 U.S. 340, 351-52 (1979); S. Rep. No. 813, 89th Cong., 1st Sess. 3 (1965). Unless the requested material falls within one of the exemptions, the FOIA requires that records and material in the possession

of the federal agencies be made available on demand to any member of the general public. *NLRB* v. *Robbins Tire & Rubber Co., supra* at 220-221. The exemptions are made exclusive, 5 U.S.C. 552 (c), and are plainly intended to set up concrete workable standards for determining whether particular materials may be withheld or must be disclosed. The burden is on the agency to substain a decision denying disclosure. 5 U.S.C. 552 (a) (3); *EPA, supra* at 79.

As eloquently stated by Hon. Sam J. Ervin, Jr., United States Senator from North Carolina:

> If America is to continue under a government of law and not of men, the opportunity of every citizen to inform himself about current issues is of supreme importance. Yet, as our government becomes increasingly more complex and bureaucratic, we find it more and more difficult to know how countless thousands of daily administrative decisions are being made, who is making them, and indeed what is actually being said in them.
>
> S. 1666 is an important step toward making the public's right to know a meaningful right. That the public has such a right cannot be disputed, for a democratic form of government presupposes such a right. Without it, the electorate cannot, in any real sense, choose its representatives; for the right to make such a choice certainly includes the right to inform oneself concerning the alternatives. The people only control their government so long as they have a voice in its decisions; but this voice is a nullity if people have no way of informing themselves of government decisions. Freedom of Information Act Hearings on S. 1666 and S. 1663 Before the Subcommittee of Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 35-36 (1963).

In their brief, petitioners argue that when considering the FOIA Congress viewed all census data provided by individual respondents as confidential. See comments of representatives Olsen, Moss, McClosky and Absug, Pet. B. 17-18. However, it is clear even from these comments that Congress did not intend Exemption 3 to extend any greater "non-disclosure status" than had already been provided by the Census Act. When Exemption 3 was being considered by congressional committee, it was observed that there were nearly one hundred statutes or parts of statutes which restricted public access to specific government records and that the FOIA was not meant to modify any of these provisions. See H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1966). Thus, Exemption 3 only exempts from disclosure that which the Census Act had specifically exempted from disclosure.[2]

B. Exception 3 permits nondisclosure where required by statute.

Exemption 3 of the FOIA provides:

> (b) This section does not apply to matters that are ——
>
> (3) specifically exempted from disclosure by statute . . ., provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the

[2] At the time of the FOIA amendment (1966) the 1954 version of the Census Act was in effect. Act of August 31, 1954 ch. 1158, 68 Stat. 1012. As will be noted *infra*, at note 12, this version permitted the discretionary disclosure of identifiable individual data.

> issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; (5 U.S.C. 552 (b) (3))

In order for a statute to qualify as an Exemption 3 statute it must require non disclosure and the statute must either itself clearly state what information must be withheld leaving no discretion to the agency involved, or the statute must clearly set forth guidelines or standards to guide the agency in the determination of what information is to be withheld from the public. See H.R. Rep. No. 94-880, 94 Cong., 2d Sess. 9 (1976)[3]

To the extent that the Census Act prohibits the disclosure of information that can be identified with particular individuals the provisions of the Act qualify as a Exemption 3 statute. As discussed in the following section, however, and as demonstrated by the record, the list of street numbers requested by respondent does not reveal any information about any person and no provision of the Census Law bars its release.

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[3] The importance of the requirements above is exemplified by the ruling in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975), and the events occurring after that decision. In that case, the court dealt with a prior version of Exemption 3 which provided that the disclosure sections of the FOIA did not apply to matters that were specifically exempted from disclosure by statute. The non-disclosure statute in that case did not require non-disclosure but merely prohibited disclosure in the Administrator's judgment. Further, the standard set forth in the statute to guide the Administrator's judgment, i.e. disclosure, would adversely affect the interest of the objecting party and disclosure was not required to be disclosed in the public interest, were vague and unclear. Nevertheless, the court determined that the above non disclosure provision was an exemption 3 statute. *Administrator, FAA* at 259. Congress promptly responded to that determination by enacting the present version of Exemption 3.

In their brief, petitioners argue that the production of a list of Essex County street numbers from the Bureau's address registers and other records constitutes a hardship upon the Bureau. Specifically, they state that while it is possible to redact such a list from the Bureau's master address registers and other records, doing so would constitute an administrative burden. Pet. B. 36-37, 37 fn 30[4]

If the petitioners contend that the presence of other data on the Bureau's address records exempt the records from disclosure, then it is the government's burden to prove that the names cannot be deleted prior to disclosure. The FOIA requires that "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt [from disclosure]." 5 U.S.C. 552 (b). The burden of proving that redaction cannot be reasonably accomplished is on the government, 5 U.S.C. 552 (a) (4) (B); *Mead Data Cent., Inc.* v. *U.S. Department of Air Force*, 566 F. 2d 242, 259-262 (D.C. Cir. 1977).[5]

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[4] In fn 30 of Petitioner's Brief, it is stated that, ". . . a list of addresses could be culled from the master address registers for Essex County only by copying the thousands of pages constituting the master address registers and by manually redacting . . . [a] substantial amount of information . . ." This contention is without any foundation in the record below. The county repeatedly sought, through discovery, to determine what would be required for the Bureau to produce a bare list of addresses. The Bureau fought each of those efforts and failed to develop a record on the subject. (R. 23-24, of August 13, 1980).

[5] Congress considered the hardship argument when evaluating the FOIA. Many federal agencies argued that the FOIA would constitute a financial and administrative burden. See Freedom

(Footnote continued on following page)

The petitioners did not even attempt below to demonstrate non-segregability. In fact, they repeatedly refused to produce evidence regarding the extent to which its data was computerized and thus amenable to simple, electronic redaction. The county's motion for discovery on this issue was granted by Judge Sarokin for the express purpose of determining the potential for achieving segregability. (R. 23-24, of August 13, 1980).[6]

Sections 8 and 9 of the Census Act do not prohibit the disclosure of a bare list of street numbers.

Section 8 of the Census Act, 13 U.S.C. 8, provides in relevant part:

(Footnote continued from preceding page)

of Information Hearings S. 1666 and S. 1663, Before the Subcommittee on Administrative Practice and, Procedure of the Senate Committee on the Judiciary, 88th Cong. 1st Sess. 267, 268, 278-279, (1963). Despite these protests, the FOIA specifically contemplated situations in which FOIA requests may require the agency involved to make a "search for" "collect" and "appropriately examine a voluminous amount of separate and distinct records. . . ." 5 U.S.C. 552 (a) (6) (B) (i) (ii). The Act also recognized that in some cases the agency involved must in responding to a FOIA request delete certain exempt portions of agency records. 5 U.S.C. 552 (b). Additionally, the Court has rejected the hardship argument. See *CPSC* v. *GTE Sylvania*, 447 U.S. 102, 123 (1980). Compare *Kissenger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 153-154 (1980); See also S. Rep. No. 93-854, 93 Cong., 2d Sess. 12, where the committee observed, "Nonetheless, the committee believes it desirable to encourage agencies to process request for . . . information even if doing so involves performing services . . ."

[6] The discovery order was later stayed pending appeal.

> (b) Subject to the limitations contained in sections 6(c) and 9 of this title, the Secretary may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent, and may make special statistical compilations and surveys . . . for . . . the Federal Government . . . the District of Columbia, . . . the government of any possession or area . . . referred to in section 191(a) . . . state or local agencies, or other public or private persons and agencies.

Section 9 of the Census Act, 13 U.S.C. 9, provides in relevant part:

> (a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may except as provided in section 8 of this title—
>
> (1) use the information furnished under the provisions of this title for any purpose other than the statistical purpose for which it is supplied; or
>
> (2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or
>
> (3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

In construing a statute, the starting point for interpretation is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that lan-

guage must ordinarily be regarded as conclusive. *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The clear meaning of section 8(b) and 9(a) prohibit the disclosure only of data which can be identified with particular individuals. Section 9(a) provides that: (1) petitioners may not use any of the data collected for non-statistical purposes; (2) petitioners cannot make any publication of data where any particular respondent can be identified; and (3) petitioners cannot allow anyone other than sworn officers of the Department of Commerce to examine individual reports. None of these limitations prohibit the disclosure of a bare list of street numbers.

Petitioners argue that Section 9(a)(1) of the Census Act limits the use of what it characterizes as "all raw census data" to Bureau personnel for the Bureau's own statistical purpose.[7] (Pet. B. 22). On the contrary however,

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[7] In its brief, petitioners cite H.R.Rep. No. 960, 60th Cong., 1st Sess. 5 (1908) to support their position that section 9(a)(1) limits the use of "raw census data" to Bureau personnel for the Bureau's own statistical purpose, admonishing that only the Bureau's "statistical data" may become public. (Pet. B. 22 fn 18); (See also Pet. B. 76 where it is stated that in considering a prior version of the Census Act, Congress understood that all census schedules and other information obtained by the Census Act was completely confidential). The language referred to by petitioners in H.R. Rep. No. 960 does not support their argument. The pertinent language merely states that the purpose of certain penal provisions in the proposed bill, then under consideration, was to safeguard against the "unauthorized" publicity of data contained on census schedules. Under the Census Act in effect at the time of this report as well as the subsequently enacted version of the 1909 Census Act, the Director of the Census had discretion to authorize the disclosure of such information. Act of Mar. 3, 1899, Ch. 419, Section 21, 30 Stat. 1014, 1020; Act of July 2, 1909,

(Footnote continued on following page)

section 9(a)(1) does not in any manner attempt to distinguish between, to use petitioners' terms, "raw census data", "aggregate statistical data", or "numerical data". It simply states that the Census Bureau may not use any information provided under Title 13 for non-statistical purposes. This prohibition clearly is imposed to prohibit the abuse by Census Bureau personnel of information provided to the Census Bureau. Even petitioners admitted in their court of appeal's brief, at 18 below, that "[Congress in Section 9(a)(1)] did not intend to establish standards or criteria for public release, even on a limited basis".[8]

Section 9(a)(2) only prevents the publication of data where the establishment or the individual furnishing the data can be identified. This provision also would not prevent the disclosure of a bare list of street numbers. The county does not seek access to any information which reveals anything about any particular individual respondent. A bare list of street numbers simply does not reveal the

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(Footnote continued from preceding page)

Ch. 2, Section 32, 36 Stat. 1, 8. Additionally, the acts by their own wording allowed the disclosure of information contained on census schedules. Section 30 of the 1899 Census Act gave governors of states, or territories and municipal governments access to information contained on census schedules. Section 32 of the 1909 Act in addition gave access of such information to courts of records and to individuals. Thus, petitioners argument in this regard is without merit.

[8] In any event, if petitioners insist that section 9(a)(1) is a limitation on disclosure of the data requested here, it is noted that the county has maintained throughout this proceeding, and petitioners have not persuasively shown otherwise, that it seeks such information to enhance the accurate enumeration of persons residing in Essex County, thus in furtherance of the Bureau's own "statistical purpose".

identity of any individual (s) or business (es) or even the existence of any individual (s) or business(es) at any address. The county has not requested any information about the type of dwelling, the number of units, or the number of persons residing therein. Because the information requested by the county is so innocuous and does not reveal anything at all about any individual, it is impossible for any government to utilize this data for any purpose of prosecution.

Section 9(a) (3) of the Census Act directs Bureau personnel to prohibit observation by non-personnel of individual census reports. The county does not seek access to individual reports. It only seeks access to the list of street numbers used by the Census Bureau in conducting the 1980 census. Thus, based upon a plain reading of section 9(a), none of its provisions prevents the disclosure of a bare list of street numbers.

Section 8(b) of the Census Act authorizes the census bureau to disclose data which is not individually identifiable, and to conduct studies and surveys for federal, state, local and private entities. The present version of section 8(b) was enacted in 1976. 13 U.S.C. 8(b) (1976). In a House report accompanying the 1976 amendment it was observed:

> Section 8(b) currently allows the secretary to furnish Census records and to undertake special statistical activities for certain public and private entities upon the payment of the cost involved. The House Amendment prohibits the furnishing of statistical information which discloses information reported by or on behalf of any respondent. H.R. Rep. No. 94-1719, 94th Cong. 2d Sess. 10 (1976).

Section 9 describes section 8 as the exception to the prohibitions of Section 9. The list of street numbers sought

by the county is not barred from disclosure by 13 U.S.C. 9 and there is, consequently, no need to consider the statutory exceptions to section 9's prohibition.

Even so, the petitioners misconceive the scope of disclosure permitted under section 8. Section 8 allows disclosure of "tabulations" and "statistical materials" which do not disclose the information reported by, or on behalf of, any particular respondent . . .". The concern here, as in section 9, is to preclude disclosures that identify individuals. A list of street numbers does not provide any such information and, hence, section 8 provides specific authority for disclosure. Neither "tabulations" nor "statistical materials" is defined in the census statute.[9] A list of street numbers is not a tabulation, but such a list must naturally be included within the term "statistical materials".

Moreover, when Congress attempted a definition of statistical records in the Privay Act, 5 U.S.C. 552 (a) *et seq*,

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[9] In its brief, petitioners argued that section 8(b) prohibited the disclosure of all "raw census data". (Pet. B. 7-8, 20, 25, 26). Petitioners thereupon attempt to distort the meaning of "tabulations" and "statistical materials" required to be released by section 8(b) to mean only "aggregate data" or "numerical data". This distortion necessarily raises the question of whether the census statute is clear with respect to what information should be disclosed, or if the statute sets "clear" standards. Apparently, petitioners themselves raised the question of their Exemption 3 status.

Obviously the statute is clear. It prohibits the disclosure of identifiable individual information. Neither section 8 or section 9 make any express or implied reference to raw census data. What those sections do provide is that the Census Bureau cannot release data which identifies an individual.

such was defined broadly as, ". . . a record . . . maintained for statistical research or reporting purposes. . . .". 5 U.S.C. 552 (a) (b).[10]

Petitioners cite *Seymore* v. *Barabba*, 559 F. 2d 806 (D.C. Cir. 1977), *McNicholas* v. *Klutznick*, 644 F. 2d 844 (10th Cir. 1981) cert. granted, No. 80-1781 (June 15, 1981), and 36 Op. Atty's Gen. 362 (1930) to support its position that all census data provided to it by respondents is confidential. However, the holding in *Seymore* that names and addresses together with other identifying information is not subject to disclosure under the Census Act is distinguishable because such information (names, addresses and other identifying information with respect to individual respondents) when submitted in combination clearly revealed the

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[10] Petitioners argue that in evaluating the Privacy Act, 5 U.S.C. 552 (a) Congress construed the Census Act as prohibiting the disclosure of all census data relating to an individual. (Pet. B. 31-32). This argument should be rejected. Like the non-disclosure provisions of the Census Act, the Privacy Act sought to prevent the disclosure by federal agencies of records containing personal information about an individual. In a congressional report accompanying the act, it was observed that the Privacy Act would prohibit the transfer of records between federal agencies "unless the record is in the form that it is not individually identifiable". It was noted that the exception to this rule allowed such transfers to the Census Bureau because the Census Act also prohibited the disclosure of individually identifiable records. H.R. Rep. No. 93-1416, 93rd Cong., 2d Sess. 12-13 (1974). This authorization for transfer does not support petitioners' position that Congress read the Census Act to prohibit the disclosure of all census data provided by an individual. In fact Congress refused to apply the access, challenge and review of records provisions of the Privacy Act to census data because the Senate Committee believed that before applying those provisions a careful review of the Census Act was necessary. S. Rep. No. 93-1183, 93rd Cong., 2d. Sess. 77 (1974).

identity of individual respondents, and further disclosed that specific information was provided to the Census Bureau by specific respondents. The opinion of the Attorney General is distinguishable on the same basis. In the opinion it was stated that the Womens' Bureau sought access to the names, addresses, occupation and status of employment of workers in the City of Rochester, New York. Clearly, this information, if provided in combination, would reveal information about particular individual respondents. In contrast to these cases, the disclosure of the above list of street numbers does not disclose any information about a particular respondent.

In *McNicholas,* the City of Denver sought access to the Bureau's vacancy lists setting out the vacancy status of individual dwelling units in the City and County of Denver. Unlike that case the county's request here is for a list of street addresses which does not reveal any information about an individual. A list of street addresses does not identify who provided a particular address, who lives there, how many people live there, whether anyone lives there, what type of dwelling is there, or whether there is a dwelling there. There is simply no way in which street addresses could reveal the occupancy status of a dwelling or the presence or absence of an individual therein.

In order to indulge petitioners with respect to the county's intentions, the county consented, in accord with the district court's request to have its personnel sworn in the manner referred to in 13 U.S.C. 23(c) so that county personnel would be subject to the penal sanctions imposed upon petitioners' personnel. See 13 U.S.C. 214. This provision of the order was not sought by the county and, respondent submits, was not required.

The argument made by petitioners that the district court's ruling is a "tacit acknowledgment" that its order "constitutes an evasion of congressionally mandated confidentiality" is without merits. Pet. B. 43-44. Any fair-minded reading of the district court's decision makes it clear that the court found that the information sought by the county was not confidential.

Moreover, with the exception of *McNicholas, supra,* the cases cited by petitioners in connection with this contention only stand for the proposition that where Congress has enacted a statute and has provided a specific remedy for violation, and it appears from the statutory language and history that the remedy provided is exclusive, the court is not free to construct an alternate remedy.[11]

Although the opinion in *McNicholas* specifically stated that the district court's order represented a tacit admission that the information was exempt from disclosure, that decision is without precedent and contrary to the holding in *Renegotiation Board, supra* at 19 wherein the court stated with respect to the FOIA, "With the express vesting of equitable jurisdiction in the district court by 552 (a), there is little to suggest, despite the Act's purpose, that Congress sought to limit the inherent powers of an equity court." Accordingly, petitioners' assertion that the district court's action was inappropriate and constituted an admission should be rejected.

While Congress has passed numerous amendments to the Census Act establishing the confidential nature of information provided by a particular individual, Pet. B. 27, the amendments do not support a general ban on

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[11] See *T.V.A.* v. *Hill,* 437 U.S. 153, 194 (1978); *Renegotiation Board* v. *Bannercraft Clothing Co.,* 415 U.S. 1, 18 (1974); *Diamond* v. *Chakrabarty,* 447 U.S. 303, 318 (1980); *United States* v. *Rutherford,* 442 U.S. 544, 559 (1979).

the disclosure of all census data. Rather, the amendments reflect Congress' concern about the disclosure of identifiable individual data.[12]

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[12] Up until the recent 1976 amendments of the Census Act, Act of Oct. 17, 1976, 94-521, 90 Stat. 2459, the Act allowed the discretionary disclosure of all census data including individual data. From 1790 to 1830, census schedules were subject to public view. Act of March 1, 1790, ch. 2, Section 7, 1 Stat. 101, 103; Act of Feb. 28, 1800, ch. 12, Section 7, 2 Stat. 11, 13; Act of Mar. 26, 1810, ch. 17, Section 7, 2 Stat. 564, 567-568; Act of Mar. 14, 1820, ch. 24, Section 7, 3 Stat. 548, 549.

From 1830 to 1879, there were no provisions in the census statutes for public view of census schedules, nor were there any confidentiality provisions. Act of Mar. 23, 1830, ch. 24, 4 Stat. 383; Act of Mar. 3, 1839, ch. 80, 5 Stat. 331; Act of May 23, 1850, ch. 43, 9 Stat. 428. In 1879 Section 7 of the census act required that enumerators take an oath affirming or swearing not to disclose information contained in census schedules. Additionally Section 12 provided that unauthorized disclosure of census data constituted a misdemeanor. Act of Mar. 3, 1879, ch. 195, Sections 7, 12, 20, Stat. 473, 475, 476. The Act of Mar. 1, 1889, ch. 318, Sections 8, 13, 23, 25, Stat. 760, 763, 764, 767, again provided in Section 8 the non-disclosure provision in the oath. Section 13 set forth a penalty for disclosure, "without the authority of the superintendent". Despite the non-disclosure provisions in the 1889 Act however, Section 23 permitted disclosure of information contained in census schedules to municipal governments. In the Act of Mar. 3, 1899, ch. 419, Section 30, 30 Stat. 1014, 1021, the disclosure of such information was broadened to include ". . . governors of any State or Territory", and in the Act of July 2, 1909, ch. 2, Section 32, 36 Stat. 1, 8, Congress again broadened the category to include disclosure of such information to courts of records and individuals. This authorization of disclosure continued up until the 1976 amendment. See Act of Mar. 3, 1919, ch. 97, Section 33, 40 Stat. 1291, 1302; Act of June 18, 1929, ch. 28, Section 18, 46 Stat. 21, 25; Act of Aug. 31, 1954, ch. 1158, Section 8, 68 Stat. 1012, 1013.

(Footnote continued on following page)

The 1976 Amendment to the Census Act was designed to protect the individual's right not to be identified to non-bureau personnel by the information which he or she provided to the Census Bureau. The purpose of that amendment was not to grant a right to the Bureau to keep all "raw census data" free from FOIA requests.

There is no significant legislative history with respect to the 1976 amendment to Section 8. Thus the Legislative history of the 1969 and 1972 proposed amendments containing substantially identical language should be examined.[18]

The clear concern of Congress when considering the amendments was not the confidentiality of raw census data, but the individual's right to privacy and the individual's expectation that identifiable information would be kept confidential. In this regard representative Broyhill stated:

> Specifically, my people are asking that the facts they furnish to the census not be placed on computer tapes *corresponding with their names.* 115 Cong. Rec. 27033 (1969) (Emphasis added.)

(Footnote continued from preceding page)

Thus, the history of the Census Act itself does not lend credibility to petitioners' argument that Congress has designated all raw census data as confidential. On the contrary, as shown above, prior amendments to the Census Act increasingly permitted disclosure subject to the Bureau's discretion.

[18] See House Bills 12884 and 14153. Both bills eliminated the authority of the Secretary to provide access to individual data to courts of records, States, territories and individuals. Both bills revised Section 8 to permit disclosure only of information which would not disclose identifiable information reported by a particular individual. H.R. Rep. No. 91-407, 91st Cong., 1st Sess. 6-7, 14-15 (1969); H.R. Rep. No. 92-1288, 92nd Cong., 2d Sess. 11, 20-21 (1972).

In both committee reports evaluating the proposed amendments to Section 8, it was observed that section 8(b) authorized the furnishing of tables and other census records without regard to the privacy of the individual, and that the amendments "would continue the foregoing authorization"; that is, the Census Bureau could continue to make tables and census records available except that, under the amendments, disclosure of information which could be identified with particular individuals was now prohibited. H. R. Rep. No. 91-407, supra, at p. 7; H.R. Rep. No. 92-1288, supra, at p. 11.

The petitioners argue that disclosure of street number data will discourage public participation in the census. This argument is without merit. It is the assurance that the individual will not be identified or penalized by non Bureau personnel and not a general ban on the disclosure of all census data that assures the voluntary participation in the census. If public concern exists, it is undoubtedly a result of the Bureau's own baseless complaint that the courts are compelling disclosure of confidential material. There is no reason to believe that release of street address data is itself a matter of public concern; in fact, the record is absolutely barren of factual support for the Bureau's claim. The greater concern must be that an accurate census be conducted.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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